

A **ARIFFIN A GHANI v. MALAYAN BANKING BHD**

HIGH COURT MALAYA, MELAKA

MOHD RADZI ABDUL HAMID J

[ORIGINATING SUMMONS NO: MA-24NCvC-500-12-2023]

7 JANUARY 2025

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Abstract – *A secured creditor, under the Insolvency Act 1967 ('Act'), is prohibited from charging interest on a bankrupt's debt if the security is not realised within 12 months from the date of the bankruptcy order. The express prohibition of s. 8(2A) of the Act cannot be overridden by contractual agreements or estoppel. Even though the bankrupt is a co-borrower, the prohibition of charging interest on the bankrupt's portion of the debt still stands; the debt must be segregated. Although a full redemption statement may be issued including the co-borrower's debt, any payment made must be applied to the bankrupt's portion of the debt, without the addition of illegal post-bankruptcy interest. There would also be no overpayment refund, but rather a deduction of the illegally charged interest.*

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BANKING: *Bank and banking business – Bank and customer – Customer co-borrower of loan granted by bank – Customer later adjudged as bankrupt – Various payments made into loan account since act of bankruptcy – No segregation of loan account between customer as bankrupt and as co-borrower – Bank continued to charge interest on loan account – Whether bank prohibited from charging interest in respect of customer's debt – Whether bank had realised security held within 12 months from date of bankruptcy order – Whether monies paid based on continued charging of interest amounted to overpayment and ought to be refunded to customer – Insolvency Act 1967, s. 8(2A)*

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The plaintiff and his wife were co-borrowers of a loan granted by the defendant. A piece of land ('property') belonging to the plaintiff was collateralised in favour of the defendant as security for the loan. The plaintiff was later adjudged as a bankrupt and, since the act of bankruptcy, various payments were made into the loan account; there was no segregation of the loan account between the plaintiff as a bankrupt and as the co-borrower. The defendant had continued to charge interest on the loan account. Hence, the present application by the plaintiff, pursuant to s. 8(2A) of the Insolvency Act 1967 ('Act'). In support of his application, the plaintiff submitted that following his act of bankruptcy, the defendant, as a secured creditor, was legally prohibited from charging interest in respect of his debt if the defendant did not realise the security it held within 12 months from the date of the bankruptcy order and, therefore, any monies paid based on the continued charging of interest amounted to an overpayment and should be

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refunded to the plaintiff. The defendant, on the other hand, argued that: (i) the plaintiff was bound by the terms of the loan and charge documents and, therefore, the defendant was entitled to claim full interest in accordance with what had been contractually agreed; (ii) there was an attempt by the plaintiff to sell the land by way of private treaty and since the plaintiff had agreed to the redemption sum stated by the defendant, the plaintiff was therefore estopped from later questioning the legality of the amount; and (iii) it would be against the law to order any overpayment to be returned to the plaintiff since his affairs and assets had, since the date of bankruptcy, been vested in the Director General of Insolvency.

Held (allowing application):

- (1) The effect of s. 8(2A) of the Act, on the prohibition of charging interest, is settled law. By the provision of s. 8(2A) and the judicial authorities, a secured creditor is not permitted by law to charge interest since the date of bankruptcy if, within 12 months since that date, the secured creditor had not realised the security. It was not disputed that the defendant had not realised the security within 12 months since the date of bankruptcy. The defendant was therefore barred as a secured creditor from charging interest on the plaintiff's debt for the period of bankruptcy. (para 9)
- (2) There could be no argument favouring the defendant that the plaintiff had agreed to the redemption amount where interest was included and was therefore estopped from challenging its legality later. The argument of approbation and reprobation and whatever may have been negotiated and agreed between parties could not surmount the express prohibition of s. 8(2A) of the Act. (para 10)
- (3) The defendant's continued charging of interest against the plaintiff, post-date of bankruptcy was unlawful notwithstanding that he was a co-borrower. Interest from that date could only continue to be charged against the co-borrower. It was incumbent upon the defendant to segregate the plaintiff's indebtedness from the co-borrower to reflect the application of s. 8(2) of the Act. Notwithstanding that, where a redemption statement was issued, the defendant was entitled to provide a statement for the full amount as it included the co-borrower's indebtedness under the loan account. In the event the redemption is paid, that amount would be applied equally to extinguish all the plaintiff's indebtedness as at the bankruptcy date less interest during the period of bankruptcy. (paras 11 & 12)
- (4) There could be no claim for overpayment since all payments were made to the same loan account as the co-borrower towards the reduction of the overall indebtedness. The plaintiff was only entitled to a deduction of all interest charged against him. For that reason, there could not be any refund of all monies paid post-date of bankruptcy. (para 14)

A Case(s) referred to:

Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd [2013] 1 CLJ 24 FC (refd)

Chin Nyuk Min v. Mystique Bay Sdn Bhd [2013] 3 CLJ 843 HC (refd)

CIMB Bank Bhd v. Anthony Lawrence Bourke & Anor [2019] 2 CLJ 1 FC (refd)

Genneva Malaysia Sdn Bhd v. Tio Jit Hong & Ors [2020] 4 CLJ 449 CA (refd)

B *Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd* [1991] 1 CLJ 656; [1991] 1 CLJ (Rep) 174 SC (refd)

Mohd Sofi Abdul Ghafar v. Ketua Pengarah Insolvensi & Anor [2021] 7 CLJ 621 HC (refd)

OCBC Bank (Malaysia) Bhd v. Tan Eng Kwee [2003] 3 CLJ 161 HC (refd)

C *Pilecon Realty Sdn Bhd v. Public Bank Bhd & Ors And Other Appeals* [2013] 2 CLJ 893 FC (refd)

Tong Soon Tiong & Ors v. FA Securities Sdn Bhd [2013] 2 CLJ 448 FC (refd)

Valiant Development Sdn Bhd v. Malayan Banking Bhd [2020] CLJU 2091; [2020] 1 LNS 2091 HC (refd)

Legislation referred to:

D Contracts Act 1950, s. 29

Insolvency Act 1967, s. 8(2A)

For the plaintiff - Ahmad Musthafi Mohamad; M/s Hashim Amran Tabian Ahmad

For the defendant - Mohd Faizal Rosli; M/s Jal & Lim

E *Reported by Najib Tamby*

JUDGMENT

Mohd Radzi Abdul Hamid J:

Matter Before This Court

F [1] This is a decision of this court on an application by way of originating summons filed by the plaintiff for certain orders pursuant to s. 8(2A), of the Insolvency Act 1967 ('the Act'). Essentially, the plaintiff claims that following his act of bankruptcy, the defendant, as a secured creditor, is legally prohibited from charging interest in respect of his debt if the defendant does not realise the security it holds within 12 months from the date of the bankruptcy order and therefore any monies paid based on the continued charging of interest amounts to an overpayment and should be refunded to the plaintiff.

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Background Facts

H [2] The background facts are that:

(i) the plaintiff is the owner of a piece of land held under GMM 289, Lot 3094 (previously HMM 63 PT1196), Mukim Peringgit, Daerah Melaka Tengah ('property');

I (ii) the plaintiff and his wife are co-borrowers of a loan granted by the defendant;

- (iii) that property was collateralised in favour of the defendant as security for the loan; A
- (iv) the plaintiff was adjudged a bankrupt on 8 October 2012;
- (v) since the act of bankruptcy, various payments were made into the loan account; B
- (vi) there was no segregation of the loan account between the plaintiff as a bankrupt and the co-borrower; and
- (vii) the defendant has continued to charge interest on the loan account despite the prohibition under s. 8(2A) of the Act as far as it concerns the bankrupted plaintiff. C

Arguments Of Parties

[3] The plaintiff contends that s. 8(2) of the Act prohibits the defendant from charging interest since the defendant have not realised the security within a period of 12 months from the date of the bankruptcy. The fact that the defendant has not realised the security is not disputed. Since the defendant is not entitled to charge interest, the defendant should have segregated his account as a bankrupt and not continued to be placed in the same account with the co-borrower where interest continues to be charged. Since there has been continuous charging of interest against him from the date of bankruptcy, the plaintiff claims there has been overpayment in the reduction of his indebtedness and he is entitled to a refund of all monies that have been applied towards payment of interest. D E

[4] To support his case the plaintiff referred to the decisions in *Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd* [2013] 1 CLJ 24; [2013] 1 MLJ 449; *OCBC Bank (Malaysia) Bhd v. Tan Eng Kwee* [2003] 3 CLJ 161; [2003] 6 MLJ 470 and *Chin Nyuk Min v. Mystique Bay Sdn Bhd* [2013] 3 CLJ 843; [2012] 10 MLJ 872. F

[5] The defendant argues that the plaintiff is bound by the terms of the loan and charge documents, and therefore, the defendant is entitled to claim full interest in accordance with what has been contractually agreed. In addition, it was argued that there was an attempt by the plaintiff to sell the land by way of private treaty and since the plaintiff had agreed to the redemption sum stated by the defendant, the plaintiff is therefore estopped from later questioning the legality of the amount. It was further argued that it would be against the law to order any overpayment to be returned to the plaintiff since his affairs and assets have since the date of bankruptcy, vested in the Director General of Insolvency. G H

[6] In support of its case, the defendant referred to the decisions in *CIMB Bank Bhd v. Anthony Lawrence Bourke & Anor* [2019] 2 CLJ 1; [2019] 2 MLJ 1; *Genneva Malaysia Sdn Bhd v. Tio Jit Hong & Ors* [2020] 4 CLJ 449; [2020] I

- A 6 MLJ 703; *Tong Soon Tiong & Ors v. FA Securities Sdn Bhd* [2013] 2 CLJ 448; [2013] 3 MLRA 94 and *Mohd Sofi Abdul Ghafar v. Ketua Pengarah Insolvensi & Anor* [2021] 7 CLJ 621; [2023] MLJU 220.

Deliberations

- B [7] Section 8(2A) of the Act provides:

(2A) Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a bankruptcy order if he does not realize his security within twelve months from the date of the bankruptcy order.

- C [8] It must be stated that decisions that dealt specifically with s. 8(2A) of the Act must be distinguished from cases that do not. The decisions in *CIMB Bank Bhd v. Anthony Bourke* and *Genneva Malaysia (supra)* referred to by the plaintiff did not deal with s. 8(2A) of the Act. In the case of *CIMB Bank (supra)*, the dispute was on the issue of construction of the loan documents and the applicability of s. 29 of the Contracts Act 1950 and in *Genneva Malaysia (supra)*, it was an appeal against an order for summary judgment on the transaction of purchase and sale of gold.
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- [9] Therefore, this court must primarily be guided by the decisions in cases that have addressed the effect of s. 8(2A) of the Act. The effect of s. 8(2A) of the Act on the prohibition of charging interest is settled law. In addition to the cases referred to by the plaintiff, this court refers also to the decisions in *Pilecon Realty Sdn Bhd v. Public Bank Bhd & Ors And Other Appeals* [2013] 2 CLJ 893; [2013] 3 MLJ 1 and *Valiant Development Sdn Bhd v. Malayan Banking Bhd* [2020] CLJU 2091; [2020] 1 LNS 2091. It is clear by the provision of s. 8(2A) and those judicial authorities, a secured creditor is not permitted by law to charge interest since the date of bankruptcy if within 12 months since that date, the secured creditor has not realised the security. It is not a disputed fact in this application that the defendant has not realised the security within 12 months since the date of bankruptcy. Referring to the defendant in this application, it is therefore barred as a secured creditor from charging interest on the plaintiff's debt for the period of bankruptcy. In *Pilecon Realty (supra)*, the Federal Court held:
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- H Thus, although a secured creditor under sub-s. 8(2) of the BA was free to deal with his security, with the insertion of the sub-s. (2A) into s. 8, the chargee must realise their security promptly within six months of the receiving order failing which the chargee cannot claim any interest.

- I Decisions of the courts prior to sub-s. (2A) being introduced into s. 8 of the BA, or does not involve any issue arising from s. 8(2A), would accordingly be of little, if any, assistance to us, in making a considered decision in this case. The duty of the courts is to make a construction to cure the mischief and advance the remedy. It is not our duty either to add or to take away the meaning of the words of a statute unless there are good reasons for thinking that the Legislature had intended to limit its operation.

For the courts to limit the application of a certain provision when the Legislature had failed to express such an intention would be to usurp the functions of the Legislature which is not within the competence of the courts to do. The duty of the courts is to give full effect to the language of the law. The function of the courts is to construe the language of the referral and related provisions as they stand, to give effect to the purpose of enacting the provision, and the mischief which existed which the Legislature sought to eliminate.

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[10] That being the case, there can be no argument favouring the defendant that the plaintiff had agreed to the redemption amount wherein interest was included and is therefore estopped from then challenging its legality later. As held in *Valiant Development (supra)*, the argument of approbation and reprobation and whatever may have been negotiated and agreed between parties cannot surmount the express prohibition of s. 8(2A) of the Act. Reference is also made to the decision of the Supreme Court in *Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd* [1991] 1 CLJ 656; [1991] 1 CLJ (Rep) 174; [1991] 1 MLJ 404, where it was held that there can be no estoppel as against statutory provisions. The court in *Valiant Development (supra)* stated:

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[18] Tied up to the issue of approbation and reprobation was the series of meetings held between MBB, the Official Receiver and the contributories and/or directors where it was said the termination of the winding up and discharge of bankruptcy was agreed upon as long as MBB was allowed the auction proceeds in full.

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[19] In this regard, the Court was of the considered opinion that whatever was purported to have been agreed upon cannot negate the statutory provision of Section 8(2A) BA. This was so held in *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503 where an agreement violated a condition of the licence where such breach was an offence under section 21 of the Pool Betting Act 1967. This was held to be contrary to Section 24(a) of the Contract Act 1950 and the agreement was illegal and void.

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[20] The same here where such an agreement, if any is contrary to Section 8(2A) and is illegal and void. Such an agreement cannot override the dear provisions of statute. If MBB is not entitled to the interest after the Applicant has been wound up, then it cannot be said that now MBB is entitled because parties had come to a resolution or agreement.

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[11] That being the position, it is clear that the defendant's continued charging of interest against the plaintiff post-date of bankruptcy is unlawful, notwithstanding that he is a co-borrower. Interest from that date can only continue to be charged against the co-borrower. Therefore, it is incumbent upon the defendant to segregate the plaintiff's indebtedness from the co-borrower to reflect the application of s. 8(2A) of the Act.

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A [12] Notwithstanding that, it is the court's view where a redemption statement is issued, the defendant is entitled to provide a statement for the full amount as it includes the co-borrower's indebtedness under the loan account. In the event the redemption is paid, that amount will be applied equally to extinguish all the plaintiff's indebtedness as at the bankruptcy date less interest during the period of bankruptcy.

B [13] As stated above, all payments into the account should be applied not only towards the general indebtedness under the loan account but also towards ensuring compliance with s. 8(2A) of the Act as far as it concerns the plaintiff. The plaintiff is entitled to a deduction of all interest charged from the date of bankruptcy for the period of his bankruptcy. Thus, the benefit of all payments towards the reduction of the loan should be equally applied for the benefit of the plaintiff as much as it applies to the co-borrower.

C [14] Can the plaintiff now argue that there has been overpayment as far as his account is concerned and claim a refund? In this court's view there can be no claim for overpayment since all payments are made to the same loan account as the co-borrower towards reduction of the overall indebtedness. The plaintiff is only entitled to a deduction of all interest charges against him. For that reason, there cannot be any refund of all monies paid post-date of bankruptcy.

E **Decision**

[15] Therefore, having considered all arguments and based on the above deliberations, this court finds and holds that:

- F (i) the charging of interest as against the plaintiff from the date of his bankruptcy on 8 October 2012 is in contravention of the express provision of s. 8(2A) of the Act; and
- G (ii) the amount of interest charged from the date of bankruptcy and continuing for the period of bankruptcy is ordered to be deducted from the plaintiff's indebtedness. The plaintiff's application for the refund of monies paid is dismissed. No order as to costs.

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